

Broadway, Inc., d/b/a K-BAR-B Youth Ranch and Gail Padgett. Case 15–CA–14035(E)

October 30, 1998

**SUPPLEMENTAL DECISION AND ORDER
BY MEMBERS LIEBMAN, HURTGEN, AND
BRAME**

On June 10, 1998, Administrative Law Judge William N. Cates issued the attached supplemental decision. The Respondent filed exceptions, a supporting brief, and a petition to increase attorney fees. The General Counsel filed an answering brief, and the Respondent filed a reply to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the application for an award of attorney's fees and expenses under the Equal Access to Justice Act be denied.

SUPPLEMENTAL DECISION AND ORDER

[EQUAL ACCESS TO JUSTICE ACT]

WILLIAM N. CATES, Associate Chief Judge. On March 6, 1998, the National Labor Relations Board (the Board) issued its Decision and Order in the above-entitled unfair labor practice proceeding as 325 NLRB 409. My underlying Bench Decision in the case was adopted wherein I concluded the General Counsel (Government) failed to show, as alleged, that Broadway, Inc. d/b/a K-BAR-B Youth Ranch (Company) discharged its employees William Pellegrin, Jennifer Pellegrin, Tia Waterman, and suspended its employee Aimee Rojas because of a belief, albeit mistaken, that they were engaged in protected concerted activities.¹

Thereafter on April 3, 1998, the Company filed an Application For and Memorandum in Support of Request for Costs and

¹ In its reply brief the Respondent moved to strike the General Counsel's answering brief as being violative of Sec. 102.46(j) of the Board's Rules and Regulations. We deny the Respondent's motion to strike as lacking in merit.

² In view of our agreement with the judge's finding that the Respondent is not entitled to recover fees and expenses under the Equal Access to Justice Act, we need not address its petition for an increase in the amount of fees recoverable.

In finding that the General Counsel was "substantially justified" in issuing complaint, Member Hurtgen notes that there was circumstantial evidence to raise a credibility issue concerning Executive Director Speed's explanation of her motivation for firing employees. There was a reasonable chance that such evidence could undermine Speed's otherwise uncontradicted testimony. Absent such evidence, there would likely have been no reasonable basis for issuance of a complaint.

¹ The Board found it unnecessary to rely on my alternative rationale that even if the "sick out" was found to be protected concerted activity, the employees conduct was indefensible.

Fees Pursuant to the Equal Access to Justice Act (EAJA), Pub. L. 96–481, 94 Stat. 2325 and Section 102.143 of the Board's Rules and Regulations. On that same date, the Board referred the above-entitled matter to me for further appropriate action, but retained before it the Company's Petition to Increase Attorney's Fees for Costs and Fees.

A. Brief Review of the Facts

A brief review of the facts, as determined in my Bench Decision, is helpful at this point.² It was established management was notified on the evening of May 22, 1996, that certain employees had concerns regarding overtime pay they had not received which the employees felt they were entitled to. Thereafter, Company Supervisor (and Charging Party) Padgett spoke about the concerns with Company Executive Director Mary Speed, who did not seriously contest or dispute the overtime problem. Speed promised Padgett the matter would be cleared up and the employees would be paid their overtime on their next 2-week pay period. This resolution of the overtime problem was related by Supervisor Padgett to certain of the alleged discriminatees.

Sometime late during the evening (after 11 p.m.) of May 22, 1996, or very early (before 1 a.m.) May 23, 1996, the four-named discriminatees notified the Company they were sick and would not, and did not, report for their regularly scheduled work assignments on May 23, 1996.

These May 22–23, 1996 events gave rise to the question: "Was there a conspiracy to call in sick and engage in a work stoppage to protest the overtime situation?"

I concluded in my Bench Decision the four alleged discriminatees were, as they testified, sick and unable to report for work. Specifically I found "they were not withholding their services to protest the failure to adequately or properly pay overtime the employees perceived and perhaps the Company acknowledged that they were entitled to."

I further addressed the question: "Did the Company mistakenly believe the employees were engaged in a concerted work stoppage in order to protest work-related grievances and discharged the employees for that reason?" I concluded the Company clearly perceived the employees were engaged in concerted activities. The credited evidence establishes Company Executive Director Speed was informed on the evening of May 22, 1996, that the four alleged discriminatees had at approximately 11 p.m. been laughing, partying, and going out for Cokes. Shortly after 11 p.m. the Company received word these same four alleged discriminatees had called in sick and that there had been "some discussion among them about calling in sick." I found the Company "perceived" the four alleged discriminatees "had engaged in concert or were acting in concert." I concluded; however, the Company, Executive Director Speed in particular, did not perceive that the four alleged discriminatees concerted conduct was "protected" by the Act. Executive Director Speed testified, and I credited her testimony, that "she believed they [the four alleged discriminatees] were engaging in a sick-out and that was the only reason [for discharging them]; she had no other motive for taking the action [she did] against them."

I concluded Executive Director Speed, based on her credited testimony, was not unlawfully motivated when she discharged

² All essential facts are detailed in my original Bench Decision and I have not attempted to fully summarize the facts in this Supplemental Decision.

the four alleged discriminatees. I based my conclusion “on the fact that she [Executive Director Speed] had information that the employees in question were conducting themselves [party-ing] in a manner that perhaps was inconsistent with the reasons [being sick] they had called in [to the Company].”

B. The Company's Theory

The Company advances a threefold theory in support of its request for fees and costs. First, the Company contends the Government had access to and was in possession of unemployment compensation hearing transcripts in which the alleged “discriminatees” stated under oath they had not conspired to protest working conditions. Counsel for the Company argues the Government was on notice as a result of the transcripts of the unemployment compensation hearings the “alleged discriminatees” were not protesting “anything.” The transcripts of the unemployment compensation hearings for Padgett, William Pellegrin, and Tia Waterman disclaim any protest of pay or working conditions or of any conspiracy to engage in any such protest. Counsel for the Company argues that because the Government was aware the Company was not engaged in a labor dispute with its employees at the time of what it terms the employees “sick-out” the Government knew there was no nexus between the employees’ dismissal and any unlawful motivation (or animus) on the part of the Company. Counsel for the Company argues the Government possessed no information to establish that the person (namely, Executive Director Speed) making the decision to terminate (and suspend) the employees believed the employees were engaging in any “protected” concerted activities. The Company argues the Government had uncontroverted statements from an eye witness who saw the alleged discriminatees laughing, joking, and cutting up within minutes of a series of calls to the Company in which it was alleged they were sick. Counsel for the Company argues all the Government had regarding wrongful motive on the part of the Company was “a mere inference of pretext” on the part of the Company’s official responsible for terminating (and suspending) the employees in question.

The second theory of justification the Company advances for fees and costs is the Government had access to and was in possession of unemployment compensation transcripts in which the Charging Party admitted under oath that any complaints about working conditions had been resolved prior to the alleged concerted activity on the part of the alleged discriminatees. Counsel for the Company argues that counsel for the Government “obviously in an excess of zeal” to prosecute ignored the Charging Party’s (Gail Padgett’s) sworn unemployment compensation hearing testimony that she had communicated Company Executive Director Speed’s resolution of the overtime dispute to alleged discriminatee William Pellegrin.

The third reason the Company advances as justification for its request for litigation costs and fees is that Counsel for the Government had both an affidavit and a written statement from a witness whose testimony proved to the Judge the terminations were not in retaliation for any protest the alleged discriminatees may have participated in or been involved with. Counsel for the Company argues “[t]he fact that this critical witness’s testimony was truthful and unassailable ab initio is evidence by General Counsel’s *inability to generate one substantive question in cross-examination* of this witness at trial.” Counsel for the Company further argues Counsel for the Government possessed no information that Company Executive Director Speed,

at the time she decided to terminate the employees, believed they were engaging in protected concerted activities. Counsel for the Company argues “General Counsel was well aware, prior to proceeding to trial, that the case was reduced to a mere inference of pretext” and nothing more.

C. Government's Motion to Dismiss

Counsel for the Government’s Motion to Dismiss is premised on the assertion the Government’s position was “substantially justified” based upon the record in the underlying unfair labor practice trial and evidence contained in the Government’s investigative file.

Counsel for the Government notes Congress characterized the “substantially justified” standard as one of reasonableness. Counsel for the Government argues where the Government can show its case had a reasonable basis both in law and fact no award should be made. Counsel for the Government notes Congress emphasized no adverse inferences were to be drawn from the fact the Government did not prevail in the adversary adjudication. Counsel for the Government points out the standard of reasonable justification does not require the Government to establish its decision to litigate was based even on a substantial probability of prevailing in the adjudication of the matter. Counsel for the Government argues the Congressional history of the EAJA requires only that “an agency could show its decision to go forward was reasonable, without establishing that prospectively there had been a substantial probability it would win.”

Counsel for the Government also argues an award is to be denied where “special circumstances make an award unjust.” Counsel for the Government notes that the Congressional Committee Reports explain the meaning of this particular provision as follows:

This “safety valve” helps to ensure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underline vigorous enforcement efforts. It also gives the Court discretion to deny awards where equitable considerations dictate an award should not be made.

Counsel for the Government asserts that particularly in cases involving credibility issues the reasonableness standard is to be applied in light of the statutory division of functions under the Act when the General Counsel is assigned the duty to investigate all charges, to issue complaints, and to prosecute such complaints before the Board. Counsel for the Government points out that often in investigating unfair labor practice charges bonifide credibility conflicts arise. Counsel for the Government notes if a charging party is credited a prima facie case can be established; however, if the responding party and its witnesses are believed no violation would be established. Counsel for the Government argues that in cases in which credibility conflicts cannot be resolved administratively on the basis of objective evidence it is both proper and reasonable for the government to present such credibility issues to a judge and the Board to resolve.

Counsel for the Government argues a credibility determination was necessary regarding the Company’s reason for terminating the alleged discriminatees herein. Counsel for the Government contends the Company asserts that notwithstanding the concerted nature of the actions of its employees in calling in sick en mass, the reasons for Company Executive Director

Speed to disbelieve the authenticity of the sick-out and the widespread employee contempt and verbal protests regarding pay irregularities that occurred the day prior to the sick-out the Government was not “substantially justified” in proceeding. Counsel for the Government argues this contention of the Company cannot be supported by the facts. Counsel for the Government argues circumstantial evidence indicated the alleged discriminatees were terminated or suspended based on the Company’s “perception” the employees were engaging in *protected* concerted activity. Counsel for the Government notes it was only after the Judge determined, based on a credibility resolution, that the Company (Executive Director Speed in particular) did not link the employees job related protests to the concerted activity that the complaint was dismissed and the dismissal was upheld by the Board.

Counsel for the Government argues that although the Company was victorious there is nothing in the record to suggest the Government’s position at trial was not “substantially justified.” Counsel for the Government notes the Company’s first argument that the transcripts of the hearings with the State agency involving unemployment compensation for the employees undermined the Government’s position is misplaced because the issues in unemployment hearings are not the same as those in unfair labor practice proceedings. Counsel for the Government notes the outcome of an unemployment compensation hearing in no way constitutes *Res judicata* before a judge or the Board. Counsel for the Government further argues even if some of the testimony in the unemployment hearings could have had a bearing on the allegations in the Board case the substance of the testimony illicit in no way rendered the theories of the Government as lacking foundation. Counsel for the Government notes the Company contends the named discriminatees testified at the unemployment proceedings they called in sick because they were physically ill. Counsel for the Government notes it was the Government’s position the Company did not believe the employees were ill and the Company retaliated for its mistaken belief that the employees were engaged in protected concerted activity. Counsel for the Government therefore argues the previous testimony of the employees does not undermine the theory advanced by the Government.

Second, counsel for the Government notes the Company argued its application for fees and costs should be granted on the basis the Charging Party admitted the work place disputes were resolved. Counsel for the Government argues this cannot be borne out by the record facts. Counsel for the Government notes the Charging Party testified she told her son, William Pelligrin, that Company Executive Director Speed told her she would talk to another company official and they would work the overtime problems out. Charging Party Padgett testified she felt really good at the prospect of being paid what she was owed. Counsel for the Government argues this testimony does not suggest that Padgett, and the other employees, were satisfied with the Company’s response to the workplace overtime pay dispute. Counsel for the Government argues however, that the critical question is not how the employees interpreted Company Executive Director Speed’s response to their overtime problems, but rather, how the Company (specifically Executive Director Speed) interpreted what the employees were doing when they called in sick that formed the basis of the Government’s case. Counsel for the Government argued that the Company (Executive Director Speed in particularly) believed

the employees to be acting in concert in protest of working conditions.

Finally, counsel for the Government addresses the Company’s contention the Government had statements by Company Executive Director Speed that she did not believe the employees who engaged in the sickout were actually physically ill. Counsel for the Government argues Speed admitted she did not believe the employees were ill and then “searched” for another explanation coming up with the “prank explanation” as to why the employees absented themselves from work. Counsel for the Government argues that the Judge believed Speed’s explanation does not negate the fact the Government was substantially justified in proceeding to trial with this case. Counsel for the Government points out the Judge believed Company Executive Director Speed’s testimony despite the circumstantial evidence to the contrary. Counsel for the Government argues this was obviously to the benefit of the Company but hardly suggests the Government’s case was fatally flawed from its inception. Counsel for the Government argues a review of the record evidence will lead to a finding the Government’s complaint in this matter was substantially justified and although the Company may be entitled to a favorable ruling on the underlying facts in the unfair labor practice case it not entitled to expenses, costs, and fees, thus the Company’s application for costs and fees must be dismissed.

D. Company’s Response to Government’s Motion

On May 20, 1998, the Company filed a response to government’s counsel’s Motion to Dismiss. Counsel for the Company argues that the Government in its Motion to Dismiss “even now persists in substituting policy for law and prosecutorial zeal for reason and facts.” Counsel for the Company asserts “[b]esides being casual and generally non-responsive, the General Counsel’s arguments for dismissal are simply wrong.” Counsel for the Company argues it is not necessary that the unemployment compensation hearings records operate as *Res judicata* as to the Board’s proceedings but that such should have, and did serve as, valid impeachment materials against the Government’s case and the facts therein were, without question, known to the Government prior to its proceeding to trial herein. Second, counsel for the Company argues “for the General Counsel to hide behind a ‘credibility-call’ shield here is disingenuous at best.” Finally, counsel for the Company again points out that counsel for the Government did not extensively cross-examine one of its critical witnesses. Thus, he argues, such further establishes the validity of Company Executive Director Speed’s credibility which credibility was known to the Government during the investigative stages of the case. Counsel for the Company asserts counsel for the Government failed to establish the Government’s position was substantially justified.

E. Company’s Eligibility

The Company contends, and the Government does not challenge, it qualifies as a tax-exempt organization under Section 501(c)(3) of the IR Code (26 U.S.C. § 501(c)(3)). The applicable subsection of the Equal Access to Justice Act (See, EAJA 5 U.S.C. § 504(b)(1)(B)) reads in pertinent part:

(B) “party” means a party, as defined in section 551(3) of this title [5 USCS § 551(3)], who is (i) an individual whose net worth did not exceed \$2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association,

unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; *except that an organization described in section 501(c)(3) of the internal revenue code of 1954 (26 U.S.C. 501(c)(3)) [26 USCS § 501(c)(3) exempt from taxation under section 501(a) of such code [26 USCS § 501(a)], or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) [12 USCS § 1141j(a)], may be a party regardless of the net worth of such organization or cooperative association;* [Emphasis added.]

I find the Company qualifies under the Equal Access to Justice Act on the basis of its tax-exempt status as described above.

E. Prevailing Party

The Company contends it is a prevailing party. Section 102.143(b) of the Board's Rules and Regulations defines a prevailing party, in part, as a "respondent in an adversary adjudication who prevails in that proceeding . . . is eligible to apply for an award of fees and other expenses allowable under the provisions of Section 102.145 of the Rules." I find the Company herein is a prevailing party.

F. Substantial Justification

Section 504(a)(1) of the Equal Access to Justice Act, 5 U.S.C. § 504 et seq., provides that the adjudicating agency

shall reward to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

Section 102.144 of the Board's Rules and Regulations provides in full with respect to standards for awards that:

(a) An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that the General Counsel's position in the proceeding was substantially justified.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the adversary adjudication or if special circumstances make the award sought unjust.

As has often been noted, the Supreme Court set forth the standards for determining substantial justification in *Pierce v. Underwood*, 487 U.S. 552 (1988). The Court stated, "substantially justified" means "justified to a degree that could satisfy a reasonable person" or as having a "reasonable basis both in fact and law."

G. Analysis and Conclusions

Simply stated the Government's theory of a violation of the National Labor Relations Act, as amended, (the Act) in the underlying unfair labor practice case was factually sufficient, legally sound and substantially justified. The Government's theory, as alleged, was that the Company discharged (and suspended) the alleged discriminatees because of a belief, albeit mistaken, that the alleged discriminatees were engaged in protected concerted activity. The reasonableness of the Government's theory of the case did not rest on whether the alleged discriminatees were actually sick, as testified to in the unemployment hearings, or whether their overtime concerns had been resolved; but, rather whether the Company "perceived" the alleged discriminatees were engaging in protected concerted activity. It is how the Company interpreted what its employees were doing when they called in sick and the Company's response thereto that formed the crux of the Government's case. The overtime concerns, the en mass sick-out and the timing of the adverse actions against the alleged discriminatees clearly established the reasonableness of the Government's case. It was only with the crediting of Company Executive Director Speed's testimony that she did not link the alleged discriminatees job related protests to their concerted activity that the Company prevailed and the complaint was dismissed. I specifically reject, as patently without merit, the Company's contention the Government's position could somehow not be substantially justified because of the manner or degree of cross-examination by Government counsel of one of the Company's witnesses.

It is recommended that the Company's Application for Costs and Fees be, as urged by the Government, dismissed.³

ORDER

It is ordered that the application be dismissed.⁴

³ I find it unnecessary to address any assertion the Government may be making that special circumstances exist herein to dismiss the Company's application within the "safety valve" intention of Congress that reasonable law enforcement efforts not be chilled.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the board and all objections to them shall be deemed waived for all purposes.